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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-993

MARGARET LOVISI,

Petitioner

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
HOW THE FEDERAL QUESTION WAS RAISED	3
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	7
APPENDIX A – JUDGMENT	11

TABLE OF CITATIONS

A Quantity of Copies of Books v. *Kansas*, 378 U.S. 205, 84 S.Ct. 1723 (1964)	6
Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58, 83 S.Ct. 631 (1963)	6
Buchanan v. *Batchelor*, 308 F. Supp 729 (D.C. Tex. 1970)	4
Cotner v. *Henry*, 394 F.2d 874 (7th Cir. 1968)	4
Griswold v. *State*, 381 U.S. 479, 85 S.Ct. 1678	5
Stanley v. *Georgia*, 394, U.S. 557, 89 S.Ct. 1243 (1969)	6

STATUTES

Burns Ind. Stat. Ch. 169 Sec. 10-4221	4
Section 18.1-212, Code of Virginia, 1950, as amended	3
Texas Penal Code, Article 524	4

OTHERS

28 U.S.C. Sec. 1257 (3)	1
U. S. Constitution, First Amendment	2
U. S. Constitution, Fourth Amendment	2
U. S. Constitution, Fourteenth Amendment	2

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

OPINIONS BELOW

The Supreme Court of Appeals wrote no opinion in affirming the judgment of conviction by denying a writ of error. The trial judge's oral opinion denying the motion to set the verdict of the jury aside as being contrary to the law and the evidence is not reported.

JURISDICTION

1. The Supreme Court of Appeals denied review on November 8, 1971.

2. The federal question was raised as shown below.

3. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

Whether or not the Virginia statute prohibiting sodomy is unconstitutional pursuant to the First, Fourth, and Fourteenth

Amendments to the United States Constitution, when applied to consenting adults in the privacy of a private home.

Was the seizure of a photo allegedly showing the petitioner in an act of sodomy in violation of her right to lawfully possess such material in the privacy of her own home?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First, Fourth, and Fourteenth Amendments to the Constitution of the United States are sufficiently familiar as not to require quotation.

STATEMENT

The petitioner was arrested on a felony warrant alleging a violation of Section 18.1-212 of the Code of Virginia, 1950, as amended, which is the general section prohibiting the act of sodomy in the State of Virginia. The petitioner was tried before a trial judge and jury and was convicted of the charge and received the maximum punishment under the statute which was three years in the state penitentiary. The petitioner did not testify on her own behalf, however, evidence was presented on behalf of the petitioner. The evidence against the petitioner consisted of a polaroid photo, the date of the taking of which was in conflict, testimony of the male individual who was also charged with sodomy, but who had been tried in a different trial, and testimony of the petitioner's daughter. The polaroid photo which had been seized in a search of the petitioner's residence was alleged to have been taken by the petitioner's daughter, although the state's own witness, the male involved in the photo, stated that the photo was taken with a self-timing device. Final sentencing of the petitioner in accordance with the verdict of the jury took place on September 11, 1970. At the conclusion of the evidence for the state, the petitioner moved to strike the evidence, which motion was overruled. After the jury returned with its verdict the petitioner moved to have the verdict set aside as being contrary to the law and evidence, and on September 11, 1970, this motion was overruled.

The petitioner then made application to the Supreme Court of Appeals, Virginia's highest Court, for a writ of error which was denied: "... the Court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Circuit Court."

HOW THE FEDERAL QUESTION WAS RAISED

1. Several times during the trial the petitioner raised the fact that the statute that the state was proceeding under was unconstitutional.

2. The same contention of violation of the petitioner's constitutional rights was argued in the motion to strike the evidence of the Commonwealth and also in the motion to set aside the verdict of the jury as being contrary to the law and the evidence.

3. It was repeated in the Petition for Writ of Error, filed by the petitioner, seeking review of her conviction by the Commonwealth's highest court.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that Section 18.1-212 of the Code of Virginia, 1950, as amended, is unconstitutional both under the Virginia and the United States Constitution. The section reads as follows:

> "If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.
>
> "If any person shall by force carnally know any male or female person by the anus or by or with the mouth he

or she shall be guilty of a felony and shall be confined in the penitentiary not less than three nor more than ten years."

Since the indictment did not allege any force being used it was incumbent upon the Commonwealth to rely upon the first paragraph of the statute. It is submitted that the statute is overbroad, vague, and an invasion of privacy, all in violation of the Virginia Constitution and the United States Constitution.

The case of *Buchanan* v. *Batchelor*, 308 F. Supp 729 (D.C. Tex. 1970) went into the Texas sodomy statute which is found at Article 524 of the Texas Penal Code and reads as follows:

"Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years."

The Buchanan case goes on to state that Article 524 makes no distinction whether acts it described as sodomy are committed homosexually, or whether by married or unmarried persons. Indeed it plainly appears that Article 524 applies to private consensual acts between married persons and private acts of sodomy between homosexuals.

Buchanan went on to hold at page 735, "In conclusion, Article 524 is void on its face for unconstitutional overbreadth insofar as it reaches the private consensual acts of married couples."

The case of *Cotner* v. *Henry*, 394 F. 2d 873 (7th Cir. 1968) involved the Indiana sodomy statute cited at Burns Ind. Stat. Ch. 169 Sec. 10-4221, which reads as follows:

"Whoever commits the abominable and detestable crime against nature with mankind or beast, or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution, shall be deemed guilty of sodomy and, on conviction, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) to which may be added imprisonment in the state prison not less than two (2) nor more than fourteen (14) years."

The Cotner case went on to cite the case of *Groswold* v. *State*, 381 U.S. 479, 85 S.Ct. 1678 and said: "In Groswold the Supreme Court recognized a constitutional right to marital privacy and held that the right is violated by the imposition of criminal sanctions for the use of birth control devices by married couples. The import of the Griswold decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty."

Of considerable importance is the fact that the American Law Institute Model Penal Code adopts the view that consensual private sexual conduct between adults should not ordinarily be subject to criminal sanction. Illinois, as well as many other states, has adopted this approach, although Indiana has not as yet joined the trend.

So we can see that the trend under the Model Penal Code would be any act between consenting adults, whether married or not, or whether performed heterosexual or homosexual.

While it is true in the instant case that the petitioner is not charged with a violation involving her husband, the record does indicate that her husband was present and apparently condoned, if not aided, the alleged act.

The trial judge seemed concerned with the allegation that the petitioner's children were present and witnessed the act, however, the answer to this is that the solution is not to charge the participants with sodomy but if desired, with an offense

against the children.

Without setting up some standards or guidelines, the Virginia statute would appear to be void, vague and overbroad, and should be declared void on its face.

The additional problem that the petitioner faced was the introduction into evidence of a polaroid photo which apparently depicted the petitioner in an act of sodomy. This photo was seized, along with numerous other items such as a coin collection, letters, other photos and films, and many books and magazines, from the private residence of the petitioner which was invaded by the Virginia Beach police armed with a search warrant to search for "pornographic literature, and/or pictures."

It is respectfully submitted that once this photo was admitted into evidence and displayed to the jury that the petitioner could not in any way have received a fair and impartial trial. It is submitted that in order to introduce what was purportedly an obscene photo that the burden then shifts to the state to affirmatively show to the trial court how it came into possession of the photo and whether or not a prior adversary hearing had been held prior to the seizure of the material. This is so since possession of this photo by the petitioner is not illegal per se. *Stanley* v. *Georgia*, 394 U.S. 557, 89 S.Ct. 1243 (1969). This Honorable Court has been quite vigilant in upholding the Fourteenth Amendment's requirement that regulation by the states of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. See, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 83 S.Ct. 631, (1963). This Court has spelled out rather clearly that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. See also, *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, 84 S.Ct. 1723 (1964).

The introduction of this photo denied the petitioner of the right to due process under the law.

CONCLUSION

For the foregoing reasons, we respectfully submit this petition for a writ of certiorari should be granted.

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Counsel for Petitioner

THEODORE N. BOYCE
105 N. Plaza Trail
Virginia Beach, Virginia 23452
Of Counsel

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 8th day of November, 1971.

The petition of Margaret Lovisi for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 11th day of September, 1970, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: /s/ Allen L. Lucy
Deputy Clerk

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No.

MARGARET LOVISI

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, the Commonwealth of Virginia, respectfully prays that the Writ of Certiorari requested by the Petitioner should not issue to review the judgment of the Supreme Court of Appeals of Virginia, entered November 8, 1971, which judgment affirmed the Petitioners Lovisis' conviction in the Circuit Court of the City of Virginia Beach, Virginia.

OPINION BELOW

The Petitioner, Margaret Lovisi, applied to the Supreme Court of Appeals of Virginia for a Writ of Error and Supersedeas to the judgment entered September 11, 1970, by the Circuit Court of the City of Virginia Beach; and on November 8, 1971, the Supreme Court of Appeals of Virginia was of opinion that there was no reversible error in the judgments complained of, rejected the Petitions, and refused the Writs of Error and Supersedeas, the effect of which was to affirm the judgment of the Circuit Court of the City of Virginia Beach.

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Princess Anne Station
Virginia Beach, Virginia 23456

JURISDICTION

It is, respectfully urged that the instant case is not such a case as would commend itself for review under the Considerations Governing Review on Certiorari, as set forth in Rule 19 of the U.S. Supreme Court Rules. This case does not raise an issue involving a Federal question of substance; the Supreme Court of Appeals of Virginia did not tender a decision in conflict with the decision of another Court of Appeals on the same matter; the Supreme Court of Appeals of Virginia did not decide an important state or territorial question in a way in conflict with applicable state or territorial laws; the Supreme Court of Appeals of Virginia did not decide an important question of Federal law, which has not been, but should be settled by this Court, nor did the Virginia Court decide a Federal question in a way in conflict with applicable decisions of this Court, and it is respectfully submitted that the State Court has not departed from the accepted and usual judicial proceedings, as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

The Respondent respectfully represents the question which can be considered by this Court for review in determining whether or not a Writ of Certiorari should issue to the Supreme Court of Appeals of Virginia be limited to those questions which were assigned as error to the Supreme Court of Appeals of Virginia for a Writ of Error to the Circuit Court of the City of Virginia Beach. Respondent's Appendix sets forth the Petitioner's Notice of Appeal and Assignment of Error, as follows as Exhibit A. Accordingly, the passing remarks made

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by the petitioner concerning photographs, which petitioner characterizes as obscene, do not seem to have a proper foundation laid.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent Statutes and Constitutional provisions involved are the First, Fourth and the Fourteenth Amendments to the United States Constitution, and the Supreme Court Rules, Rule Number 19, as set forth in Appendix B.

STATEMENT OF FACTS

In the Notice of Appeal and Assignment of Errors; the Petitioners urged the following as Error in the Circuit Court of the City of Virginia Beach, when addressing the Supreme Court of Virginia:

1. The trial Court erred in refusing to grant the defendant's motion for continuance.

2. The trial court erred in refusing to quash the indictment against the defendant on the grounds that §18.1-212 of the Code of Virginia, 1950, as amended, is unconstitutional under the laws of Virginia and of the United States.

3. The evidence was insufficient as a matter of law to convict the defendant of sodomy.

4. The trial Court erred in admitting into evidence Commonwealth's Exhibit #1.

5. The trial Court erred in refusing to set aside the verdict as being contrary to the law and evidence.

6. The trial Court erred in refusing to sustain the motion to strike the evidence of the Commonwealth.

7. The trial Court erred in granting instruction Number One.

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8. The trial Court erred in granting Instruction Number Two.

9. The trial Court erred in refusing to quash the indictment after it was amended.

The cause came on to be tried on September 11, 1970.

The Commonwealth presented its evidence, and the defendant then moved to strike the Commonwealth's evidence citing for its reason that the crime of sodomy was not established, and asserting that the sexual acts performed were private consentual acts rather than the public acts as contemplated by the statute. The defense urged at this time that the statute under which they were charged was unconstitutional citing as their reason that the statute should have excluded husband and wife, and in this Court, raises the sufficiency of a search warrant parenthetically without foundation.

ARGUMENT

1. Is Section 18.1-212 of the Code of Virginia, 1950, as amended, unconstitutional?

The appellant has set forth in full in his Petition for a Writ of Error the §18.1-212 of the Code of Virginia, 1950, as amended. The appellant urges that this statute as set forth is overbroad, "vague and an invasion of privacy, all in violation of the Virginia Constitution and the United States Constitution." He supports his position with the logic of a Texas case decided on a basis of the Texas sodomy statute found at Article 524 of the Texas Penal Code, which discusses distinctions as to whether or not the acts committed were in public or private, homosexually, or by married or unmarried persons. At the onset, the Commonwealth would like to state that there was no evidence offered by the defendant to prove

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that (a) the parties were married or (b) there was consent as between the parties. It is axiomatic that before one attacks a statute as being unconstitutional in its application to him, that one must first make some showing or introduce some evidence that would establish a foundation from which he can argue.

Not withstanding the obvious, if the defendant had shown herself to be married, that the statute should not be applicable because the acts were private and consensual, it is submitted that the evidence of the Commonwealth showed that the sodomous acts were committed and so committed in the presence of two small children and a third party, adult. The evidence is in conflict as to whether or not the children were present, but at no time was there any denial of the presence of the third party, Romeo Dunn.

It is uncontradicted that Dunn was present. To argue that the acts were private, consensual acts committed by married parties is incredible, as there is no showing of marriage, or of consent by the parties, or how the acts can be private when committed in the presence of a third party.

For these reasons, it is respectfully urged that a Writ of Certiorari be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

MARGARET LOVISI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of _____ 1972, three copies of the Brief for the Respondent in Opposition to The Granting Of A Writ Of Certiorari, were mailed, first class postage prepaid, to Theodore A. Boyce, Esquire, Boyce and Spanoulis, 105 North Plaza Trail, Princess Anne Plaza, Virginia Beach, Virginia, and to Gerald Rubinger, Esquire, Parker and Rubinger, 1397 Laskin Road, Virginia Beach, Virginia. I further certify that all parties required to be served have been served.

ANDRE EVANS
Commonwealth Attorney
for the City of Virginia Beach
Municipal Center
Virginia Beach, Virginia 23456

PENELOPE D. COFFMAN
Assistant Commonwealth Attorney

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ia Beach, Virginia 23456

A P P E N D I X "A"

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA, :

Plaintiff :

v. :

MARGARET A. LOVISI :

Defendant :

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Circuit Court of the City of Virginia Beach, Virginia:

Counsel for Margaret Lovisi, the defendant in the above styled case, hereby gives notice of appeal from the judgment entered in this case on the 11th day of September, 1970, and sets forth the following assignments of error:

1. The trial Court erred in refusing to grant the defendant's motion for continuance.

2. The trial Court erred in refusing to quash the indictment against the defendant on the grounds that §18.1-212 of the Code of Virginia, 1950, as amended, is unconstitutional under the laws of Virginia and of the United States.

3. The evidence was insufficient as a matter of law to convict the defendant of sodomy.

4. The trial Court erred in admitting into evidence Commonwealth's Exhibit #1.

5. The trial Court erred in refusing to set aside the verdict as being contrary to the law and evidence.

6. The trial Court erred in refusing to sustain the motion to strike the evidence of the Commonwealth.

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7. The trial Court erred in granting Instruction Number One.

8. The trial Court erred in granting Instruction Number Two.

9. The trial Court erred in refusing to quash the indictment after it was amended.

MARGARET LOVISI

By /s/ Gerald Rubinger
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Of Counsel

A P P E N D I X "B"

STATUTES AND CONSTITUTIONAL PROVISIONS

U. S. SUPREME COURT RULES:

Rule Number 19.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

STATUTE:

Virginia Code §54-509.

Common Nuisances. -- Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance. Repealed Acts of Assembly 1970, ch 650.

CONSTITUTIONAL PROVISIONS:

AMENDMENT XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.